(19)

IN THE

Supreme Court of the United States

October Term, 1944.

No. 246.

NEW YORK STATE GUERNSEY BREEDERS' CO-OPERATIVE, INC.,

Petitioner,

against

CLAUDE R. WICKARD, Secretary of Agriculture of the United States of America.

PETITIONER'S REPLY BRIEF.

On Petition for Writ of Certiorari to the Circuit Court of Appeals, Second Circuit.

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PETITIONER'S REPLY BRIEF.

For a reply to the brief of respondent, Claude R. Wickard, Secretary of Agriculture of the United States, in opposition to the petition for a Writ of Certiorari herein, the petitioner, New York State Guernsey Breeders' Co-Operative, Inc., respectfully submits the following:

Argument.

The respondent has attacked the contention of the petitioner on the basis of

(1) The authority of the Secretary to decide the question of granting differentials in the order "if in accordance with law".

(2) The holding of the Court in the case United States v. Rock Royal Co-operative, Inc., 307 U. S. 533, 571-573; the estoppel against this petitioner's raising the issue of the inadequacy of the butterfat differential; and the lack of proof that a butterfat differential cannot be fair unless correlated to the cost of production.

(3) The inapplicability of the New York court's construction of the New York statute to the construction of the Federal Act.

I.

Authority of the Secretary.

The Secretary has found that Guernsey milk is appreciably richer in butterfat, slightly richer in protein and mineral elements, somewhat yellower in color and considerably richer in carotene than that of Holstein and Ayrshire cows under similar conditions. Even disregarding appearance and sales appeal, Guernsey milk possesses those substances which give it value as a product, in greater abundance than milk from the breeds predominating in the milk market. That some persons contend it may be unsuitable for infant feeding should not detract from the value of Guernsey milk any more than it would from the value of caviar if considered with respect to use for the same purpose.

In the face of the Secretary's recognition of the relative merits of petitioner's milk, it is his refusal to accord an adjustment for "grade or quality" which contravenes the statute. It is the Secretary's insistence that the straight butterfat differential of 4¢ for each tenth of a point fulfills the requirement of statutory adjustments, which the petitioner submits is not "in accordance with law."

The respondent has cited a number of cases as proof that the Secretary's decision is a final and conclusive disposition of evidence. It is to be perceived, however, that the majority of the respondent's cases sprang from the National Labor Relations Act.

> "In that Act (49 Stat. 449, Sec. 10 (3) 29 U. S. C. 160) Congress provided, 'The findings of the Board as to the facts, if supported by evidence, shall be conclusive.'"
>
> National Labor Relations Board v. Waterman Steamship Corporation, 309 U. S. 206.

Rochester Telephone Corp. v. United States, 307 U. S. 125, involved a decision of the Federal Communications Commission under the Communications Act of 1934 (June 19, 1934, C. 652, § 609, 48 Stat. 1105, U. S. C. Title 47), which provides that a review by the court shall be limited to questions of law and that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall clearly appear that the findings of the Commission are arbitrary or capricious. (U. S. C., Title 47, Sect. 402(e).)

Swayne & Hoyt v. United States, 300 U. S. 297, involved an order of the Secretary of Commerce based upon findings of the Shipping Board Bureau. Originally power to make orders relative to rates was vested in the United States

Shipping Board under the Shipping Act, 1916 (Sept. 7, 1917, C. 451, § 44; July 15, 1918, c. 152, § 4, 40 Stat. 903, U. S. C., Title 46, Chap. 23, Sect. 817). Its powers were transferred to the Department of Commerce on June 10, 1933, by Executive Order No. 6166. The Shipping Act, § 31, U. S. C. Title 46, Chap. 23, Sect. 830, provides that the venue and procedure in the United States courts shall be the same as in similar suits in regard to orders of the Interstate Commerce Commission. The Interstate Commerce Act provides that in suits to enforce orders, the findings and orders of the commission shall be *prima facie* evidence of the facts therein stated (U. S. C. Title 49, Chap. 1, Sect. 16 (2)). Orders of the Interstate Commerce Commission have been held by this court to be

> "quasi-judicial and only *prima facie* correct insofar as they determine the fact and amount of damage,—as to which, since it involves the payment of money and taking of property, the carrier is, by § 16 of the act, given its day in court and the right to a judicial hearing."
>
> Mitchell Coal & Coke Co. v. Pennsylvania R. R. Co., 230 U. S. 247, 258.

In Swayne & Hoyt v. United States, *supra*, the court did consider the evidence and affirmed because it found substantial evidence to support the order of the Secretary of Commerce.

In the Agricultural Marketing Agreement Act the remedy for injury from a provision of the order is worded: "After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law."

(7 U. S. C. Sec. 608 c. (15)).

The determination of whether or not a course of conduct or prescription for one, is in accordance with law is peculiarly a judicial function and always has been.

Respondent clearly confuses the rule applicable where decisions of an administrative body are by the act made conclusive and that applicable where decisions of a body or officer are made under an act which preserves the right of judicial review.

Respondent continues, page 9 of answering brief: "Furthermore, the question of the sufficiency of the evidence to support the administrative finding does not present an issue warranting review by this Court * * * particularly when the administrative finding has been confirmed by two courts below."

That the Court does not speak so forcibly about shutting its ears and reserves a right of review is illustrated in these sentences from the Secretary's cited cases: "Since the court below has confirmed the findings of the Board there is no need to review the evidence *in detail*" (Italics, the petitioner's.) "It is *plain* that the employer * * *." "It is *clear* that * * *." "And it is *evident* that * * *."

> International Association of Machinists, Tool & Die Makers Lodge No. 35 v. National Labor Relations Board, 311 U. S. 72, at page 75.

"and after hearings, the Board found jurisdictional facts which need not be repeated and *other facts which may be shortly summarized as follows:*"

> National Licorice Co. v. National Labor Relations Board, 309 U. S. 350, at page 352.

Pick Mfg. Co. v. General Motors Corp., 299 U. S. 3, states no rule which precludes a review of the facts. It merely reiterates the recognized rule that where two courts have concurred this court will accept the findings unless clear error is shown.

In the instant case clear error is apparent. The courts below have sustained respondent as to a determination

which ignores a provision of the Act providing for an adjustment for grade or quality of product and apparently upon the erroneous theory that the determination of respondent is binding upon the courts. In so doing they have deprived petitioner of relief against a determination which, if enforced, will deprive petitioner of its property without due process of law.

II.

Equalization and Adjustment for Grade or Quality.

1. (a) The Agricultural Marketing Agreement Act itself (7. U. S. C. 608c (5) (B)) undermines the respondent's defense that United States v. Rock Royal Co-operative, Inc., 307 U. S. 533, 571-573, settled once and for all not only the constitutionality of the equalization fund but also the status of petitioner's milk. Orders "shall contain terms and conditions

(b) Providing:

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, *irrespective of the uses made* by the individual handler to whom it is delivered; subject, in either case, only to adjustments for * * * (b) the *grade or quality of the milk delivered.*"

The Rock Royal decision upheld "irrespective of the uses made." It did not set the demarcation of "adjustments for grade or quality of the milk delivered."

2. The respondent would require of the petitioner in its appeal to the Secretary for review of his ruling an exact

formula for correcting an injury. One basis for review was that adjustment for grade or quality had not been granted. Consideration of a butterfat differential was certainly inherent in petitioner's objection to the promulgated order.

Whether the present butterfat differential is or is not an adjustment for grade or quality within the meaning of the Act has been an issue in this litigation from its inception. Upon what theory it can be urged that petitioner did not raise the issue before the Secretary is not understandable to petitioner. In its amended and supplemental complaint it set forth in paragraph 9, R. 64 (Fol. 192) the history of the 4¢ butterfat differential provided for in the Order. In paragraph 20, R. 67-68, it clearly set forth that order provisions, which included the 4¢ butterfat differential provision, failed to provide as to plaintiff adjustment for the grade or quality of the milk delivered. The evidence has fully sustained petitioner's claim and there is no substantial evidence to sustain the Secretary's contrary determination.

3. That the butterfat differential cannot be fair unless related to the cost of production, and with that, to the conditions of the market, is forthrightly proved by the amendments now proposed by the Dairy and Poultry Branch, Office of Distribution of the War Food Administration. These amendments would, in conformity with other marketing areas' recognition of the relation of costs and prices of butterfat and solids, grant a varying butterfat differential which under present market conditions would raise the 4¢ to approximately 7¢.

Respondent's proposed amendments to Order 127 mentioned as a footnote at page 11 of the answering brief argue in the strongest manner possible the merit of this applica-

tion and clearly indicate that petitioner has since the inception of the order been deprived of its property without due process.

Prior to the promulgation of order number 27 the milk of petitioner enjoyed a higher than average class I utilization or sale to the public as fluid milk. This was directly caused by "the grade and quality" of its milk. If petitioner was not entitled to a special differential under the order to compensate it for the "grade and quality" of its product then petitioner was entitled to exemption under the order pursuant to the provisions of Section 611 of Title 7 U.S.C.A. and petitioner's milk should have been excluded by the Secretary of Agriculture from the operation of the provisions of that chapter.

The petitioner does not have to invoke theory to show the unfairness of a fixed and changeless 4¢ butterfat differential. Orders in other marketing areas included butterfat differentials approximating the present proposals of the Dairy and Poultry Branch. The long history of the 4¢ butterfat differential in milk pricing covered some extremely chaotic marketing periods. There was and is nothing to commend such rigidity of rate.

As a further, and it seems to petitioner a conclusive indication that it was not the intent of Congress that the arbitrary 4¢ per point butterfat differential, discussed at pages 15 and 16 of petitioner's main brief, should be seized upon by the Secretary as an adjustment for grade or quality, we wish to direct the court's attention to the provisions of 608c, 5 (B) (ii) of the act. Under sub-section (a) adjustments "for volume, market and production differentials" are specified to be those "customarily applied by the handlers subject to such order". This 4¢ butterfat dif-

ferential, as has been shown, was customarily applied by handlers in computing the price of milk, was applicable to all milk, and applied in reduction of price where milk contained less than 3.5% of butterfat and in increase of price where it contained more than that percentage. It was a part of the existing plan of pricing long used in the industry. Yet subsection (b), without adverting to differentials "customarily applied by handlers", made provision for adjustments for "the grade or quality of the milk delivered". There could be no clearer indication that something other than an existing 4¢ per point feature of the existing pricing plan was intended when the Secretary was directed to make adjustments for "grade or quality".

III.

Applicability of Construction of New York Statute.

To refute respondent's contention that the New York Guernsey cases have no bearing here, since the New York Statute provides that cost of production and other factors shall be taken into account in fixing milk prices, petitioner directs this consideration: The New York statute, profiting from the example and initiative of the Federal Act, merely says more clearly what the Federal Act certainly implies. "It is hereby declared to be the policy of Congress

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this chapter, to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agriculturial commodities in the base period " (7 U.S.C. 602 (1)).

Just what articles and commodities do dairy farmers buy, if not feed, grain, milking machines and labor? Just what are those if not a part of the cost of production?

We do contend that it has been established that petitioner's Guernsey milk has proven qualities other than butterfat content, that it costs more to produce that milk and that the character of proof was such that the Secretary was obligated to take those elements into consideration in resolving the issue as to the proper adjustment. However, leaving those elements out of consideration, there still is no adjustment for grade or quality of product in the existing order when interpreted in the light of the act under which it was promulgated. The order, as has been demonstrated in petitioner's brief submitted with the petition, penalizes rather than compensates petitioner for producing milk of high butterfat content.

Conclusion.

It is therefore respectfully submitted that the petition for a Writ of Certiorari in the instant case should be granted as prayed for in the petition herein.

Dated: Pulaski, New York, August 31, 1944.

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